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Integrity systems in engineering and construction companies: a reflection after the September earthquakes in Mexico

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In the last decade, public and private corruption and its impact began to be discussed in Mexico in an open manner on a daily basis. This was as a result of multiple factors, including the growing influence of foreign regulations that were slowly but firmly permeating high-level corporations.

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In the US, the Foreign Corrupt Practices Act (FCPA) investigates and sanctions bribery of public officers outside the country (that is, when a person gives anything of value to a public official outside the US to influence their government decisions). Although Mexico has been a signatory to international treaties in the fight against corruption for many years, and substantial changes have been made in criminal matters on the subject, no step has generated as much pressure and influence on companies in Mexico to start transforming their



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corporate policies with a view to being more demanding on bribery issues as that of the FCPA.

However, in 2015, this changed. As a consequence of the constitutional reform and the legal framework that gave rise to the national anti-corruption system (known in Spanish as Sistema Nacional Anticorrupción (SNA)), there is a legal co-liability between public officers and private individuals and companies in what we know as acts of corruption, which in administrative matters are called “serious administrative offences” and, in criminal matters, crimes.

Bringing these issues to the fore, in September 2017, the states of Chiapas and Oaxaca, as well as Mexico City and surrounding states, were hit by two devastating earthquakes which caused extensive damage and massive casualties. While at the moment of writing investigations are still in progress, much of the damage has prompted questions as to the strength of collapsed structures and the extent to which non-compliance with building regulations played a part in the disaster.

Therefore, the purpose of this article is to explain to the community of engineers and builders what is included in the SNA regarding integrity and conduct systems, and why it is necessary to have one as soon as possible given that such measures can literally save lives.

Engineering and construction: activities highly prone to corruption

According to independent studies, construction is the industry most prone to corruption in Mexico. Concern is not theoretical, it is real and practical. Is this a practice that should be accepted? Is it possible to combat it in an extremely vicious and complex environment? What can be done to deal with it efficiently without impacting business?

It is true that the SNA does not focus on a single economic activity, but if one of them is objectively and publicly known to be attacked, it is logical that the authorities will take appropriate measures. Therefore, engineering and construction companies need to take appropriate steps.

Acts of individuals

The General Law on Administrative Liabilities (known in Spanish as “Ley General de Responsabilidades Administrativas” (LGRA)) describes the “serious administrative offences” of public officers, as well as “acts of individuals related to serious administrative offences”. This is how co-liability between public and private officers is enshrined in practice through a concave and convex system in which no one should be saved from being sanctioned by an act of corruption.

The “acts of individuals connected with serious administrative offences” are like the seven deadly sins, as there are seven articles



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(with their peculiarities) that make up this chapter: (i) bribery; (ii) unlawful participation in administrative proceedings; (iii) traffic of influences; (iv) false information; (v) collusion; (vi) misuse of public resources; and (vii) improper hiring of former public officers.

Major administrative offences

For those who work in the public works sector and related services, there are multiple activities that generate risks for engineering and construction companies. These are mainly due to unsound practices that have existed in Mexico for decades and which need to be eradicated, as they may now generate serious sanctions.

It is worth noting the seriousness of the sanctions for individuals involved in acts related to serious administrative offences. These sanctions are listed below.

In the case of natural persons. First, economic penalties that may reach up to two times the benefits obtained or, if not obtained, the equivalent of the amount of 150 to 150,000 times the daily value of the unit of measurement.

Second, temporary debarment to participate in acquisitions, leases, services or public works, as applicable, for a period not less than three months or more than eight years.

Third, compensation for the liquidated damages caused to the federal, local or municipal public treasury, or to the assets of public entities.

In the case of legal persons. First, economic sanctions that can reach up to two times the benefits obtained or, if not obtained, for the equivalent of the amount of 1000 to 1.5m times the daily value of the unit of measurement.

Second, temporary debarment to participate in acquisitions, leases, services or public works, for a period not less than three months or more than 10 years.

Third, suspension of business activities, for a period not less than three months or more than three years, which shall consist of detaining, deferring or temporarily depriving individuals of their commercial, economic, contractual or business activities due to links to the serious administrative offences provided for in this law.

Fourth, dissolution of the respective company, which will consist on the loss of legal capacity of a legal person, for the fulfillment of the purpose for which it was created by jurisdictional order and as a consequence of the commission, linkage, participation and relationship with a serious administrative offense provided for in this law.

Fifth, compensation for damages caused to the federal, local or municipal public treasury, or to the assets of public entities.

How to avoid liability and why



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Corporate integrity systems are not only best practice, but essential to reduce the risk of corporate sanctions in many jurisdictions.

A system of integrity should establish clear and precise mandatory guidelines as to what employees may and may not do in matters of integrity. Further, if an employee violates these guidelines, not only should they be sanctioned personally, but the company must prove to authorities that it took all possible steps to avoid such a situation to avoid being sanctioned.

Considering international practices, article 25 of the General Law on Administrative Liabilities provides that: "In determining the liability of the moral persons referred to in this Law, it will be assessed whether they have a policy of integrity".

For the purposes of this law, a policy of integrity is considered to have at least the following elements: (i) a clear and comprehensive organisational and procedural manual, defining the roles and responsibilities of each of its areas, and clearly specifying the different chains of command and leadership throughout the structure; (ii) a code of conduct duly published and communicated among all members of the organisation, with systems and mechanisms of real implementation; (iii) adequate and effective control, monitoring and auditing systems that regularly and consistently review compliance with integrity standards throughout the organisation; (iv) appropriate complaint systems, both within the organisation and competent authorities, as well as disciplinary proceedings and concrete consequences in respect of those who act contrary to internal rules or Mexican legislation; (v) adequate training and training systems and processes for the integrity measures contained in this article; (vi) human resources policies tending to avoid the incorporation of people who may present a risk to the integrity of the corporation; and (vii) mechanisms that ensure at all times the transparency and publicity of their interests.

In order to understand article 25 of the aforementioned law, the secretary of public service in conjunction with organisations from various sectors, including the International Chamber of Commerce Mexico, recently published the 'Business Integrity Program Model', which, in general, establishes how these principles should be implemented in business practice. A pilot implementation project in combination with the United Nations will be released soon.

Thus, the value of having a complete and correct integrity system lies in the fact that the authorities (in this case, the Federal Administrative Justice Court, and not the secretary of public service) can determine the responsibility of the companies as long as integrity systems are complete and correct. Otherwise, authorities can sanction companies financially, administratively and criminally, and even force liquidation. To avoid incurring unnecessary penalties, companies in the industry must take all actions provided for by law.

Private sector efforts to promote corporate integrity



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As a consequence of national anti-corruption system laws, the private sector has started to set up clear rules to comply with integrity systems. The International Chamber of Commerce (ICC) in Mexico has been a longstanding example of best international practice to be used by small and medium companies, starting from the anti-corruption clause in due diligence guidelines. ICC Mexico is also considered to be a source of best practice for the development of integrity systems.

Other organisations, such as the Consejo Coordinador Empresarial (Entrepreneurial Coordination Counsel) and the American Chamber, have created and promoted specific codes of ethics. In terms of engineering and construction organisations, the National Chamber of the Consulting Industry, the National Chamber of the Construction Industry and the National Civil Engineers College have been working hard to promote ethics among their members.

In other words, many diverse organisations in the sector have developed important tools in order to fulfill the needs of local anti-corruption rules and regulations. However, these efforts have to be increased in the following months to achieve good, widely accepted, practical and effective self-regulation.

Last but not least, the devastating September 2017 earthquakes have emphasised the importance of fighting against corruption in the construction sector, since it is now clear that the results of inaction are far more than just theoretical fatalities.

Conclusion

According to independent studies, the construction sector is prone to corruption. The SNA establishes the co-liability of public officers and private individuals in acts of corruption. There are international mechanisms recognised as best practice which, in Mexican law, is recognised as limiting liability when companies encounter a problem. These mechanisms will be evaluated in the near future. Engineering and construction companies must immediately address the implementation of integrity systems to avoid incurring penalties and legal consequences. It is ideal to implement these measures with the support and help of expert advisers, adhere to the criteria of authorities and consider the best practices developed and yet to be developed.

The September 2017 earthquakes will put a lot of pressure on construction industry actors to include effective integrity programmes in their organisations, so they can be considered reliable and not responsible for the damaging effects of corrupt actions.

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